

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ADRIAN MARTINEZ-MONTANEZ,	:	MOTION TO VACATE
BOP No. 22993-171,	:	28 U.S.C. § 2255
Movant,	:	
	:	CIVIL ACTION NO.
v.	:	1:14-CV-1456-CAP-ECS
	:	
UNITED STATES OF AMERICA,	:	CRIMINAL ACTION NO.
Respondent.	:	1:11-CR-239-1-CAP-ECS

ORDER

This matter is before the Court on Adrian Martinez-Montanez's "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody." [Doc. No. 855].

The government is **DIRECTED TO SHOW CAUSE WITHIN SIXTY (60) DAYS** of the date of this Order why Mr. Martinez-Montanez's § 2255 motion should not be granted.

The undersigned notes that Mr. Martinez-Montanez's § 2255 motion includes a claim that "he told his attorney . . . he would like to appeal." [Doc. No. 855 at 7]. If this claim is uncontested, this § 2255 motion may be disposed of summarily. Failure to file an appeal that a criminal defendant has requested be taken is per se ineffective assistance of counsel. See Roe v. Flores-Ortega, 528 U.S. 470 (2000). The appropriate remedy is for this Court to vacate the criminal judgment, reimpose the same sentence, and afford the defendant the opportunity to file an out-of-time appeal. See United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000). And, where relief is granted on this basis, "the best approach is to dismiss without prejudice or hold in abeyance

the resolution of the remaining collateral claims pending the outcome of the direct appeal." McIver v. United States, 307 F.3d 1327, 1332 n.2 (2002).

If the government concedes that Mr. Martinez-Montanez asked his attorney to file a direct appeal on his behalf, it may limit its Response to this one claim. If the government does not concede that Mr. Martinez-Montanez made such a request, its Response should address every ground for relief raised in the § 2255 motion.

SO ORDERED, this 13th day of June, 2014.

S/ E. Clayton Scofield III
E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE